



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

July 26, 2017

VIA U.S. MAIL AND ELECTRONIC MAIL

Washington Department of Ecology
Attn: Federal Permit Coordinator
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Director Maia Bellon
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Sally Toteff
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**RE: CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION'S
COMMENT ON CLEAN WATER ACT § 401 WATER QUALITY
CERTIFICATION FOR MILLENNIUM BULK TERMINALS—LONGVIEW,
LLC, COAL EXPORT PROJECT (NWS-2010-1225)**

Dear Director Bellon and Regional Director Toteff:

The following comments on the above-referenced matter are submitted on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”).

**I. Overview of Yakama Nation’s Involvement With This Matter And The Failure To
Meaningfully Consult With The Yakama Nation To Ensure Treaty Rights Are Protected
When It Comes To This Project**

As the Yakama Nation Tribal Leaders communicated with you in the past during consultation on this matter, meaningful consultation—especially with our trustee, the United States—has remained elusive. The Yakama Nation opposes any encroachment or violation of the rights reserved to Yakama People under the Treaty with the Yakamas of 1855 (12 Stat. 951)(Yakama Treaty). And this project, at a minimum, represents further encroachment on rights we’ve been fighting for since the promises were made to our people over 160 years ago. The Yakama Nation’s Treaty with the United States, as you likely know, binds Washington State. As the Washington State Supreme Court itself has noted:

Like any treaty between the United States and another sovereign nation, a treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty.¹

Throughout the course of this project, we have submitted comments and made direct requests to our trustee (i.e., the United States) for protection of the rights reserved to our people in the Yakama Treaty. It is unfortunate that Yakama Nation is once again, at this point, pleading with the state and federal governments to recognize the primacy of our Treaty rights as they pertain to this project's plans for our ancestral homelands and waters, areas which continue to sustain our people and our culture. Nevertheless, we once again submit more comments, consistent in general with previous comments. Perhaps Washington State can step in now where the federal government has utterly failed and honor the Yakama Treaty.

The comments the Yakama Nation submitted included requests for consultation, demands for full and comprehensive environmental and cultural analyses, and a general opposition to this matter, and commenced with correspondence our former Tribal Council Chairman Harry Smiskin sent on behalf of Yakama Nation in 2013.² In that letter, the Yakama Nation noted that the proposed project, with its "coal loading facility, dock, increased coal train traffic, and Panamax ships . . . would create adverse impacts . . . to Treaty rights, including, among other things, Treaty-reserved salmon, steelhead, lamprey, and other resources critically important to the Yakama Nation and its People."³

II. Comments Specific To § 401 Water Quality Certification

If permitted, Millennium would build the largest coal terminal in the nation on the Columbia River, the center of Yakama heritage and religion and the lifeblood of its people. The coal export terminal Millennium Bulk Terminals—Longview, LLC (Millennium) proposes to build on the Columbia River violates Washington State water quality standards. Among other problems, the Final Environmental Impact Statement (FEIS) highlights how Millennium's project runs afoul of the state's Antidegradation Policy. Despite the project modifications and proposed "mitigation" measures, the project still would not only encroach on Yakama Nation's Treaty rights (which makes permitting the project contrary to law in and of itself), it also violates the state's water quality standards, as discussed in detail below. The Department of Ecology's FEIS identifies impacts to water quality; significant and adverse impacts in general which cannot be mitigated. Based on your own analysis, therefore, you must deny the §401 certification. Accordingly, Yakama Nation request the Department of Ecology be faithful to its charge and deny the permit.

¹ *State v. Buchanan*, 138 Wn.2d 186, 201, 978 P.2d 1070, 1077 (1999), as amended (Aug. 12, 1999)(citing U.S. Const. art. VI; *Antoine v. Washington*, 420 U.S. 194, 201, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991)).

² The Yakama Nation incorporates herein, by reference, all previously submitted comments and communication with respect to this project as if fully set forth herein, including those comment letters submitted to the federal government on which Washington State was copied and which should be a matter of record in this matter.

³ Smiskin Letter to U.S. Army Corps of Engineers and Department of Ecology, November 18, 2013; enclosed with this letter.

A. Your Agency's Authority To Deny Millennium's Request For Certification

The Clean Water Act (CWA) gives states the authority to place conditions on, or even deny federal environmental permits.⁴ Under § 401(a) of the CWA, applicants for a permit that will conduct any activity “which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates”⁵ The purpose of § 401, therefore, is to empower states to control or even “veto” federally permitted projects within a state’s jurisdiction that may harm water quality.⁶ In this case, because Millennium’s proposed coal terminal will discharge into waters of the United States, it must secure a permit from the U.S. Army Corps of Engineers (Corps) before its project may proceed. The Corps may not issue the permit without a certification from the Washington Department of Ecology.

The U.S. Supreme Court has held that the Washington Department of Ecology’s authority under § 401 is such that it may condition or deny a project based not only on the impacts of discharges into U.S. waters, but on any adverse impact to water quality.⁷ Washington’s water quality standards protect the “public health and public enjoyment of the waters and the propagation and protection of fish, shellfish, and wildlife.”⁸ These same regulations provide that the Columbia River is “protected by numeric and narrative criteria, designated uses, and an antidegradation policy.”⁹ Based on the FEIS, and our own analysis, therefore, the Washington Department of Ecology has both the authority and the legal justification for denying Millennium the certification it seeks under § 401 of the Clean Water Act, as detailed below.

B. Millennium’s Project Violates The State’s Water Quality Standards.

1. The project will harm designated uses in ways that cannot be mitigated.

The proposed largest coal export terminal in the United States would be disastrous for the Columbia River estuary. Among other things, the area is designated by Ecology for spawning and rearing habitat for salmon, not to mention water supply for various uses. The Yakama

⁴ See, *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994) (holding that states have authority to restrict federal activity pursuant to § 401(d)); *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006) (noting that states have the “primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution.”).

⁵ 33 U.S.C. § 401(a)(1).

⁶ *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006).
S.D. Warren Co., 547 U.S. at 380.

⁷ *PUD No. 1*, 511 U.S. at 710-13 (holding that after the existence of a discharge, is satisfied (triggering §401), “the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and any other appropriate requirement of state or tribal laws”).

⁸ WAC 173-201A-010(1).

⁹ *Id.* at (1)(a).

Nation's religion, culture, and economy are significantly dependent upon the Columbia River salmon. The Yakama Nation and its partners have rehabilitated. The Yakama Nation is under constant pressure to cede its rights with respect to its ancestral waters and the fish inhabiting those waters. The coal terminal's construction—and all the consequences that reasonably foreseeably flow from Millennium's project (e.g., increased rail and barge traffic)—are existential threats to the Yakama people and our way of life, not to mention the rights the United States promised it would leave undisturbed over 160 years ago. Under Washington law, fish habitat will be certainly adversely impacted by the project. This alone justifies denial of the certification Millennium seeks here.

As other commenters and the FEIS have noted, the area the project will impact already suffers from water quality degradation. These include “elevated water temperatures, increased nutrient loading, reduced dissolved oxygen, and increased toxic contaminants” which “pose risks to fish and wildlife, as well as people.”¹⁰ The FEIS notes, for example, that impacts to and interference with tribal fisheries in particular cannot be mitigated.¹¹ In addition to interference with the tribal fishing process (i.e., the act of harvesting fish), the FEIS acknowledges that the Millennium project will bring harm to salmon spawning, rearing, and migration.¹² The additional adverse impacts promised by the Millennium project will only make matters worse, and further degrade the water quality.

In addition, the Yakama Nation has invested considerable money and effort over the last several decades to restore salmon and other fish to these waters, which had been threatened and/or harmed due to increased human activity as the European colonizers pushed tribal people out of the Columbia River basin and onto reservations, and then built dams and otherwise encroached on our ancestral lands and waters. Despite Yakama Nation efforts, certain populations of salmon and other fish are protected by federal law because they remain endangered or threatened. Millennium's coal export facility, and its associated activity, threaten these listed fish, and threaten to undo the efforts of the Yakama Nation and others who have worked for so long and invested so much of their time and resources to restore the Columbia River. In comments on the Draft Environmental Impact Statement regarding this project, the U.S. Fish and Wildlife Service (USFWS) agreed with the Yakama Nation's long-standing concerns that the coal terminal project will “cause or result in significant coal dust deposition along the rail transport corridor.”¹³ Based on this, USFWS indicated that the Millennium Project would “measurably increase toxic pollutant concentration in soils, sediments, and water, and will very likely result in exposures, potential toxic effects, and impacts to the Service's trust resources.”¹⁴ Like the Yakama Nation, the USFWS also raised concerns that the increased marine vessel traffic promised by the Millennium project would likewise harm the fish and wildlife of the Columbia River, and, further, that Millennium had failed to identify adequate “mitigation measures” to avoid the

¹⁰ FEIS 4.5-10.

¹¹ *Id.* at 3.5-20.

¹² *Id.* at 4.7.

¹³ U.S. Fish and Wildlife Service Comments on Millennium SEPA DEIS (June 13, 2016)

¹⁴ *Id.*

significant impacts relative to the increased barge traffic and other marine vessel traffic that will occur if the Millennium project is permitted.¹⁵

Based on the foregoing harm to designated uses that will result from the Millennium project, it is clear that Ecology has the authority to deny the § 401 certification Millennium must secure. It should do so to fulfill its duties under Washington law and its duty to uphold the Treaty with the Yakamas of 1855.

2. Millennium's request for certification should be denied because it violates Washington's Antidegradation Policy.

Washington State's Antidegradation Policy here requires a Tier II Antidegradation Policy Review for this project.¹⁶ Because the FEIS describes how the project "will potentially cause a measurable change in water quality," Ecology, must reach a "necessary and overriding public interest determination" pursuant to WAC 173-201A-320(4) and implementing guidance. In doing so, Ecology must weight the costs and benefits of "the social, economic, and environmental effects associated with the lowering of water quality."¹⁷ In conducting the requisite analysis and evaluating impacts to the public interest, under principles of environmental justice, Ecology must consider the disproportionate impacts on the Yakama Nation and its people. Yakama Nation's previous comments on this project detail the immense impact, in terms of costs and harm, to the social, economic, and environmental well-being of the Yakama Nation and its people. To date, Yakama Nation has identified no significant social or environmental benefit proposed by the project to justify the harm it promises the Yakama Nation in particular, and the region as a whole; and the potential for economic benefit cannot mitigate the adverse consequences of the Millennium Project. Most importantly, there is no mitigation adequate for a violation of our Treaty rights.

III. Conclusion

Yakama Nation has successfully fended off projects with significant adverse impacts to our Treaty rights and our people that are likely and foreseeable but geographically remote from the "project area," based on rights we retain within our Ceded Lands, and in our usual and accustomed areas.¹⁸ In one case against the U.S. Department of Agriculture, we demanded negative effects to our people resulting from the transportation of garbage from Hawaii to the Roosevelt Landfill be considered—through, among other things, actual and meaningful government-to-government consultation between sovereigns—despite the fact that those effects would likely occur in areas some distance away from the landfill itself.¹⁹ The federal district court there noted in its order enjoining the project that the Yakama Nation was "likely to suffer irreparable harm," from the effects of *shipping* Hawaiian garbage through the Yakama Nation's

¹⁵ *Id.*

¹⁶ See, WAC 173-201A-320.

¹⁷ WAC 173-201A-320(4)(A).

¹⁸ See *Confederated Tribes and Bands of the Yakama Nation v. United States Dep't of Agriculture*, 2010 WL 3434091 (E.D.Wash.).

¹⁹ *Id.*

Ceded Lands, and lands and waters in which it retains “usufructuary rights.”²⁰ Those rights must be recognized here and the Treaty reserving to us those rights must be honored.

Here, Yakama Nation reiterates the concerns it raised nearly four years ago, none of which have been properly addressed by either the federal or any other government. The November 18, 2013 letter, from the Yakama Nation’s former Tribal Council Chairman, includes among other things, the following specific areas of concern:

- Analysis of the impacts of increase in rail traffic to tribal communities;
- Analysis of rail capacity and traffic control measures necessary to handle additional trains required by the Millennium project;
- Analysis of the likelihood of coal train derailments, shipping spills, and fire and explosion probabilities, and the impacts such incidents are likely to have on the terrestrial and aquatic environments, along with an analysis of how such incidents would be handled by first responders;
- Analysis of emissions from rail and ship traffic, terminal operations, and combustion by end users, including, among other things, how such emissions would exacerbate currently compromised air quality in the Columbia River Gorge, toxicity levels in our rivers and fish, as well as climate change and ocean acidification;
- Analysis of fugitive coal dust deposits along our lands and waters, at the terminal and during transport of coal through the Columbia Basin and to the final destination of the coal;
- Analysis of impacts to all cultural resources, including Traditional Cultural Properties, directly and indirectly resulting from the project. As noted previously, there are over 10,000 historic properties documented along the entire route, and many more that are yet to be identified. Impacts to cultural resources extend beyond impacts to “sites,” and such an analysis should include impacts to our ongoing cultural practices, such as longhouse services, ceremonies that require fish, roots, and other traditional foods and medicines, and the ability for us to freely practice our religious beliefs in light of the adverse effects that will result from this project;
- Analysis of all direct *and indirect* impacts to aquatic and terrestrial species and habitat along the *entire* transportation route of the coal required by the Millennium Bulk Terminals project. As the Yakama Nation and others have noted, the section of the river adjacent to the proposed terminal is the Lower Columbia River, an area designated as critical habitat for endangered species under the Endangered Species Act, including ESA-listed salmon and steelhead populations.

²⁰ *Id.* at *4.

Once again, the Yakama Nation opposes the Millennium project because it threatens our way of life and the rights reserved to Yakama people under the Treaty of 1855. Nothing your agency or anyone else has advanced shows that this trafficking of fossil fuels will not violate and diminish our rights. To the contrary, the evidence reveals that the Yakama people, along with other tribal people in our region, will be forced to bear the burdens of this project's adverse effects with none of the benefits. Since 1855, the hostile posture of federal, state, and private entities towards our people has persisted almost ceaselessly. It's past time for that posture to change, and for governments and the people the governments serve to start working together to preserve our environment for those who are here now and for future generations, not just for the Yakama Nation and its people, but also for our collective well being and the well-being of those who will follow us.

Sincerely,



Philip Rigdon,
Superintendent
Department of Natural Resources
Yakama Nation